**COURT OF APPEALS**
**DIVISION I**
**OF THE STATE OF WASHINGTON**
**Case No. 42169-1-II**

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**JANE VAN ALLEN,**
**Respondent,**
**And**
**VERNON WEBER,**
**Appellant.**

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# Brief of Appellant

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**RCW and CR** **Page No.**



**OTHER**

## I. ASSIGNMENTS OF ERROR

1. The trial court erred when it recharacterized a substantial portion of the Spanaway Rental property as Ms. Van Allen's separate property where: (1) the property was acquired during the committed intimate relationship, and was presumptively a joint asset; (2) there was no support for the implied theory of donative intent to gift a separate property interest; (3) the donor did not testify as to any gift of separate property; and (4) there was none of the formal documentation necessary to confirm the creation of a separate property interest.

2. The trial court erred when it concluded that judicial estoppel did not apply to Ms. Van Allen's assertion of inconsistent theories as to undisclosed assets where: (1) the court's decision was based on lack of prejudice to Van Allen's opponent, which is not a proper basis in law; and (2) the record supports all three elements of judicial estoppel, including the third alternative factor of unfair advantage to Ms. Van Allen and unfair detriment to Dr. Weber.

3. The trial court erred when it refused to apply judicial estoppel to Ms. Van Allen's inconsistent positions on assets

based on the erroneous legal factor that Dr. Weber was not harmed by Ms. Van Allen's deception of the court, and where all three core factors for judicial estoppel were supported, including the factor of unfair advantage and unfair detriment.

4. The trial court erred when it refused to apply judicial estoppel to Ms. Van Allen's inconsistent positions on assets when it concluded that Dr. Weber was not harmed by her duplicity, when the bankruptcy court seized his home and forced him to pay for half of Ms. Van Allen's credit card debts, and where the court failed to give Dr. Weber a credit for interest he paid on those debts after Ms Van Allen left the relationship.

5. The trial court erred when it denied reconsideration to correct a substantial overvaluation of the Chiropractic Office where: (1) the parties and court all agreed that the County assessed values would be the basis for valuing the properties; (2) the parties and court mistakenly believed that the County's assessed value for the Chiropractic Office was correct and reliable; (3) shortly after the trial, Dr. Weber was notified by the County that the assessed value for the Chiropractic Office

had been mistakenly overvalued by more than 100%; and (4) reconsideration was necessary to achieve an equitable division of a joint asset that was mistakenly overvalued through a procedure that both parties cooperated in.

6. The trial court erred when it denied reconsideration based on a finding that the value change notice was not an extraordinary circumstance where Ms. Van Allen and Dr. Weber cooperatively shared the risk of a potential re-evaluation equally, based on their equal knowledge of the Chiropractic Office.

## II. ISSUES

1. Under the standards for a just and equitable division of quasi-community property, did the trial court abuse its discretion when it mischaracterized a substantial portion of the Spanaway Rental as Ms. Van Allen's separate property based on an admittedly unsupported theory of implied donative intent?

2. Did the trial court abuse its discretion when it refused to apply judicial estoppel based on the legally erroneous basis that Ms.

Van Allen's opponent was not harmed by Ms. Van Allen's deception of the bankruptcy court?

3. Did the trial court abuse its discretion when it found judicial estoppel did not apply to Ms. Van Allen's claimed interest in properties, where the undisputed evidence shows that she benefited from the nondisclosure and harmed her opponent?

4. Did the trial court abuse its discretion under CR 60 when it refused to reconsider the value of the Chiropractic Office, even though the County provided notice that the agreed basis for that value was incorrect and grossly overstated the value?

## III. STATEMENT OF THE CASE

### A. Statement of the Facts.

The appellant, Dr. Vernon Weber, is a 72 year old chiropractor. CP 96.[1] In or about 1989, Dr. Weber became romantically involved with

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[1] "CP" designates Clerk's Papers. "VRP I" designates Volume I of the Verbatim Report of Proceedings, which includes Opening Arguments, Closing Arguments, and the trial court's Oral Ruling. "VRP II" designates Volume II, which includes the hearings on findings, conclusions, and entry of judgment.

the respondent, Jane Van Allen. CP 170, par. 5. By early 1990, Ms. Van Allen had moved into Dr. Weber's home on Alaska Street, in Tacoma. Although the couple's closeness fluctuated through the years, Ms. Van Allen and Dr. Weber continued to reside with one another until their separation on or about March, 2009. CP 171, par. 7.

**1. Bank Accounts and Business Activities.**

During their relationship, Dr. Weber and Ms. Van Allen maintained separate bank accounts, but pooled certain resources such as food and housing expenses. CP 171, par. 9; see Exhibit 71 (bank statement summary). As an elderly chiropractor, Dr. Weber's primary source of income during the relationship was from the chiropractic business, from which he received approximately $1,000 per month. CP 97, 170. In 2004, Mr. Weber took out a personal WaMu Line of Credit with approval of up to $125,000.00. Exhibits 58 and 216. This line of credit would be used by the parties during their relationship in connection with real estate transactions discussed in more detail below.

Ms. Van Allen's business activities varied, and included revenues generated from her business "Code Busters", which apparently helped individuals and businesses avoid tax expenditures. See CP 27; VRP I, p.

15. In addition, Ms. Van Allen was hired as an employee of Dr. Weber's chiropractic office, and he paid her approximately $10 an hour. In another business endeavor, Ms. Van Allen operated the Opossum Hollow Daycare from 1997 until 2002.

On the advice of consultants, the parties created a number of entities designed to hold and protect these real estate assets and businesses. See CP 170, 176, and 189, par. 3; see Exhibits 10, 219, 224, and 226; VRP I, pp. 4, 20. The trial court ultimately determined that these entities and related documents were "shams" and should be disregarded for purposes of resolving the issues in this matter. The court also disregarded Ms. Van Allen's corporate "vows of poverty" in which she disclaimed any interest in real estate. See VRP I, pp. 20-21, 25; CP 176, par. 40.

**2. The Properties.**

During their relationship, Ms. Van Allen and/or Dr. Weber participated in the ownership of six separate properties: (1) the Alaska Street Home; (2) the Federal Way Lot; (3) the Tacoma Chiropractor's Office; (4) the Spanaway Home; (5) the Parkland Rental; and (6) the Spanaway Rental. The nature of that ownership is described below.

**The Alaska Street Home.** Dr. Weber owned the Alaska Street home in Tacoma free and clear before he met Ms. Van Allen. CP 170.

She moved in with Dr. Weber in 1990, and they lived there until Weber sold this property in 1996. There was no dispute that Mr. Weber owned the Alaska Street home (and its proceeds from sale) as his separate property.

**The Federal Way Lot.** When the parties met, Mr. Weber also owned a vacant lot in Federal Way as his separate property. He owned the lot outright, and there were no outstanding loans. CP 172. During the relationship an eminent domain action was started with respect to a portion of the Federal Way Lot. CP 172. Funds generated during the parties' relationship were used to defend against the claim. CP 172; VRP II, p. 38.

**Spanaway Home (15101 13th Street).** When Dr. Weber sold his Alaska Street Home in 1996, he used $40,851 of his separate proceeds as a down payment for a Spanaway Home, with an adjacent lot. These properties were purchased for $169,000. CP 172-173; see Exhibits 125 and 126 (Settlement Statements); Exhibit 220 (Deed). The parties allege they each made varying payments on the loan balance from their accounts during the relationship, with Ms. Van Allen claiming she contributed $18,900 as the final payment to pay off the loan. CP 173.

**The Chiropractic Office (3425 South Tacoma Way).** About one year into the parties' relationship, Dr. Weber purchased a South Tacoma

Way commercial property for his chiropractic office. CP 171. The price was $68,650 and Dr. Weber used $23,000 of his separate funds from the Alaska Home for the down payment. CP 171, par. 14; Exhibit 237. The rest of the price was financed, and Dr. Weber made substantial cash contributions to a remodel of the Chiropractic Office, using earnings from his chiropractic business. CP 172-73, par. 14. Dr. Weber and Ms. Van Allen worked together in setting up the office, and Dr. Weber hired Ms. Van Allen as an office assistant. She worked as office assistant for about eight years. VRP I, pp. 5, 22; CP 172.

**The Spanaway Rental (14907 13th Street).** In 2004, Harry Phipps (Jane Van Allen's brother) signed a quit claim deed purporting to quit claim his interest in a Spanaway residential property (hereafter the "Spanaway Rental") to Earth Home Ministries, an entity that the parties had created shortly before the quit claim deed. See Exhibits 50, 224 and 230; CP 59-60. Ms. Van Allen's attorney admitted that Earth Home Ministries was "not of legal significance", and that Mr. Phipps in fact gifted the property "to the couple", collectively. VRP I, p. 25. In 2006, in spite of the earlier quit claim deed, Mr. Phipps prepared a second document purporting to transfer the Spanaway Rental to the couple. This time, Dr. Weber and Ms. Van Allen paid a $61,000 purchase price using

funds from Dr. Weber's WaMu Line of Credit. CP 15-16 and 174, par. 29; VRP I, p. 25.

**3. Ms. Van Allen's Bankruptcy**

On October 11, 2005, Ms. Van Allen filed a Voluntary Petition for Chapter 7 bankruptcy in the United States Bankruptcy Court. Exhibit 201, Petition pp. 1 to 25. The evidence at trial was that Ms. Van Allen knowingly ran up her credit card debts as a preliminary to filing for bankruptcy. See VRP I, 43, 54.

In her bankruptcy petition, Ms. Van Allen was directed to list "all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a co-tenant, community property, or in which the debtor has a life estate". Exhibit 201, Petition p. 4. As directed, Ms. Van Allen certified that all of the information offered in support of her petition was true and correct, under penalty of perjury. Exhibit 201, Petition pp. 2, 16, 22.

Ms. Van Allen withheld from the Bankruptcy Court her interests in several properties. Instead, she identified the Spanaway Home as the only significant asset, which she listed as a joint tenancy with right of survivorship. She valued the Spanaway Home at $85,000, with a $38,224 lien securing the WaMu Line of Credit. Exhibit 201, Petition p. 8. Ms. Van Allen listed $87,831 in liabilities, which included credit card debts,

amounts she owed the IRS, and a balance on Dr. Weber's WaMu Line of Credit of $38,224.71. Exhibit 201, Petition pp. 3, 8-11.

Ms. Van Allen failed to identify Dr. Weber as a "Codebtor" for any of the liabilities. Exhibit 201, Petition p. 13. Ms. Van Allen did not assert homestead protection for the Spanaway Home, and she indicated that Dr. Weber's WaMu Line of Credit would be reaffirmed. Exhibit 201, Petition pp. 4, 7, 23.

On February 7, 2006, the United States Bankruptcy Court granted Ms. Van Allen a discharge under 11 U.S.C. Sec. 727. Exhibit 201, Discharge of Debtor. However, the Trustee later learned during an investigation that Ms. Van Allen left the Spanaway Home unprotected by any exemption, and held sufficient equity to justify a sale. As a result, the Trustee arranged to seize and sell the Spanaway Home to pay off all creditors' claims. Exhibit 201, Trustee's Final Report (Pre-Distribution).

Shortly thereafter, Dr. Weber learned of Ms. Van Allen's bankruptcy filing, and the Trustee's seizure of his home, which was the only significant asset Ms. Van Allen had listed. Ms. Van Allen's actions precipitated a financial crisis. To avoid losing his home, Dr. Weber was forced to draw an additional $87,477 on the WaMu Line of Credit to essentially "buy back" his home from the Trustee, who would then use the funds to pay off Ms. Van Allen's debts as well as approximately $10,000

in legal expenses incurred by the Trustee as a result of Ms. Van Allen's bankruptcy plan. CP 96-98; Exhibit 58; Exhibit 201, Trustee's Final Report; Exhibit 201, Proposed Order Approving Transfer of Estate's Interest In Debtor's Residence; VRP I, pp. 33, 48. Dr. Weber paid the $87,477 directly to the bankruptcy court to buy back the residence, and pay off creditors, including the $37,000 owed to Ms. Van Allen's credit card companies. See Exhibit 201, Cash Receipts and Disbursements Record and Distribution Report for Closed Asset Cases; VRP I, p. 33.

At the end of Ms. Van Allen's bankruptcy proceedings, Dr. Weber ended up with a balance of nearly $125,000 on his WaMu Line of Credit. Exhibit 58; 202. In addition, Dr. Weber was forced to pay hundreds of dollars in interest per month on the line of credit used to bail Ms. Van Allen out of her fraudulent bankruptcy. Exhibit 58; VRP II, pp. 26-27.

In March, 2009, Ms. Van Allen moved out of Spanaway home. After Ms. Van Allen's departure and during her subsequent legal proceeding, Dr. Weber continued making interest payments on the line of credit, totaling approximately $8,000. Exhibit 203 (bank statements detailing interest payments).

**B. Statement of Procedure.**

On March 26, 2009, the same month Ms. Van Allen moved out of the Spanaway Home, she commenced this action by filing a

Complaint/Petition For Dissolution of Meretricious Assets/Debts, asserting claims to the various investment properties she had failed to disclose in the bankruptcy. CP 1-6. A bench trial was held during which the court was asked to address: (1) whether the parties had established a committed intimate relationship; (2) whether Ms. Van Allen was judicially estopped from asserting interests in properties she disavowed to the Bankruptcy Court; and (3) the just and equitable distribution of properties and liabilities.

Trial ended on March 30, 2011, and on April 6, 2011, the Honorable Ronald E. Culpepper issued his oral ruling. The court concluded that the parties had created a CIR, refused to apply judicial estoppel, and outlined a division of the properties in question. VRP I, pp. 68-84. Thereafter the parties and the court held a series of hearings on the parties' proposed findings and objections. VRP II. On May 5, 2011, the Court entered its final ruling. The trial court concluded that the parties had created a committed intimate relationship ("CIR") and entered its Findings and Conclusions, Order and Judgment dividing their assets and liabilities. CP 169-183.

For purposes of this appeal, Dr. Weber does not challenge the court's ruling that he and Ms. Van Allen were in a CIR. Below is a summary of the court's proceedings relevant to judicial estoppel, the

formula for distributing assets, and the motion for reconsideration based on a change in assessed value.

**1. Judicial Estoppel.**

From the outset, Dr. Weber raised the issue of judicial estoppel. He argued that Ms. Van Allen should be estopped from claiming an interest in the properties she knowingly failed to disclose in her bankruptcy. These properties included: (1) the Federal Way Property; (2) the Chiropractor Office; and (3) the Spanaway Home; and (4) the Spanaway Rental. CP See, e.g., 28-29. At trial, the testimony was that Ms. Van Allen was consciously running up debts on her credit cards as a preliminary to filing bankruptcy to try to avoid those debts. VRP I, p. 43. After trial, the trial judge found that Ms. Van Allen had knowingly advanced an inconsistent position in the bankruptcy proceeding. The trial court found that "some elements" of judicial estoppel were met, and rejected Van Allen's argument that her false bankruptcy disclosures were innocent mistakes:

> Ms. Van Allen made some prior inconsistent statements in the bankruptcy filing. She says, or Mr. Shillito says, these were mistakes. I found that, actually, very unconvincing. I don't think they were mistakes. .... disingenuous at best, false at worst.
>
> So there is some temptation to apply estoppel here since she didn't claim any interest in the property she now claims during bankruptcy. That was, I think, part of a scam to try

> to avoid IRS debt she owed and probably to defraud some creditors that she bought a lot of things from.

VRP I, pp. 68-69 (April 6, 2011); see also CP 175-177. Despite these findings the trial court ultimately ruled that judicial estoppel did not apply, adopting Ms. Van Allen's theory that she had not prejudiced Dr. Weber through her efforts to run up credit card debt and then avoid responsibility through the secret bankruptcy maneuverings. See CP 175-76, par. 39; and CP 177, par. 2.

**2. Division of Properties.**

At trial, Ms. Van Allen proposed a "simple mathematical formula" under which the three properties acquired during the relationship would be divided equally as quasi-community property, subject to adjustments under which a party would receive a prorated credit for their separate contributions to the community asset. See VRP I, pp. 9-10, 23-24, 36-37; CP 24. Because the Federal Way property was acquired before the CIR, Ms. Van Allen acknowledged it as Dr. Weber's separate property, but claimed an equitable lien based on funds spent on the eminent domain matter. See VRP I, p. 7.

In lieu of more costly and time consuming appraisers, the property values were based on the assessed values issued by the Pierce County Assessor-Treasurer. The parties and the court relied upon the County's

assessed values as proper objective evidence of value, and the court utilized that evidence in its formula for determining the amounts in property and cash to be equitably divided by the parties. See, e.g., VRP I, pp. 6, 11, 34, 39-40, 63, 76.

**The Spanaway Home.** For the Spanaway Home, the parties and the court relied on a total assessed value of $296,000.[2] CP 173; Exhibit 222; VRP I, pp. 6 and 77. The trial court allocated: (1) 29% of the property value ($85,840) to Weber as his separate property, based on his down payment of $40,851 made with separate funds on a $169,000 purchase price; (2) 7% to Van Allen as a credit for the $18,900 she contributed to pay off the home; and (3) 78% ($189,440) as the remaining joint interest to be equally divided, with $94,720 to each party. Based on these calculations the court awarded $115,440 (46%) of the value to Ms. Van Allen. CP 173-174.

**Chiropractic Office.** For the Chiropractic Office, the parties and the court adopted the assessed value of $182,000. CP 172; Exhibit 209; VRP I, pp. 39, 75. The trial court allocated: (1) one third of the property value to Dr. Weber, based on his $23,000 down payment in separate funds

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[2] This was the combined value of the two tax parcels constituting the Spanaway Home property (assessed at $74,300 and $222,400, for a total of $296,000). CP 173; Ex. 222.

towards the $68,650 purchase price; (2) and the remaining two thirds as a joint interest to be equally divided. Under this allocation Ms. Van Allen was awarded $61,000 as her one third of the present appraised value. CP. 172.

**The Federal Way Property.** In analyzing the Federal Way Property, the trial court awarded Ms. Van Allen a 100% credit for $20,000 she allegedly contributed towards fees and costs associated with the eminent domain proceeding. CP 172.

**Spanaway Rental.** As with the other properties, the value of the Spanaway Rental was based on the tax assessment, which valued it at $219,400. CP 174; Exhibit 228; VRP I, p. 79. The trial court noted a joint contribution of $61,000 paid from the WaMu Line of Credit to Ms. Van Allen's brother, Mr. Phipps when the market value was $190,000. VRP I, p. 80. Based on Ms. Van Allen's theory of "implied donative intent", the trial court departed from the equitable division of the property as a community asset, and awarded Ms. Van Allen 75% of the value, or $164,550. Under this theory, Ms. Van Allen's attorney argued that even though Mr. Phipps donated more than $120,000 of the property's value "to the couple", the court should nonetheless "imply" that the donation should be treated as a credit to Ms. Van Allen as her separate property. VRP I, pp. 25, 27-28, 37-38. Mr. Phipps did not testify at trial. See CP 169; VRP

I, p. 25. The court recognized the questionable nature of Ms. Van Allen's argument for an "implied" or "contingent sort of donative intent." VRP I, pp. 28-29, 79-81; VRP II, p. 24-25. Nonetheless, the court adopted the theory and awarded Ms. Van Allen a 75% interest in the Spanaway Rental as her own separate property. VRP I, p. 81; CP 174, par.s 29-31.

**Liabilities.** The court equally split the liabilities incurred during the relationship, ruling that Dr. Weber and Ms. Van Allen were jointly responsible for: (1) the $124,000 WaMu Line of Credit, which Dr. Weber was forced to expand in order to save the Spanaway Home from Ms. Van Allen's bankruptcy machinations; and (2) the $91,000 IRS debt that Ms. Van Allen incurred during the relationship. Each party's share was $108,500.00 VRP I, pp. 83-84 (April 6, 2011). Based on the foregoing, the trial court awarded Ms. Van Allen $219,400 ($355,990 in assets, subject to an offset of $108,500). CP 174-175. As a credit toward his share of assets, Dr. Weber was given the Chiropractic Office, based on the County assessed value that the parties and court had relied upon. CP 177. Dr. Weber timely appealed. CP 186-202.

**3. Reconsideration Based On The County's Value Correction.**

Less than two months after the court's ruling, on June 27, 2011, the Pierce County Assessor-Treasurer issued a Value Change Notice for the Chiropractic Office. The Value Change Notice retroactively revised

the assessed value to $79,800, a drop of more than $100,000 from the $182,000 assessment relied on at trial. CP 214-218. The County appraiser confirmed that the original assessment was based on erroneous information, and required a substantial downward adjustment above and beyond that seen for other parcels in Pierce County. CP 263-264.

Based on this new evidence, Dr. Weber filed a motion for reconsideration, seeking relief in the form of a hearing to show cause why there should not be a simple adjustment to the court's formula using the actual corrected value of the Chiropractic Office. CP 205-234; 259-264. The trial court found that the motion for reconsideration was timely, but denied relief based on the rationale that Dr. Weber should have known of a potential revaluation based on his twenty year ownership of the property. CP 267-269. Dr. Weber's timely appeal of that ruling has been consolidated with the original appeal.

## IV. STANDARD OF REVIEW

Generally, the Court of Appeals reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the court's conclusions of law. Soltero v. Wimer, 128 Wn. App. 364, 369, 115 P.3d 393 (2005). The court of appeals will review a trial judge's application of the doctrine of judicial estoppel for abuse of discretion. McFarling v. Evaneski, 141 Wn. App. at 499;

Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The trial court's order will not be disturbed unless the exercise of discretion was manifestly unreasonable or based on untenable grounds, or for untenable reasons. Miller v. Campbell, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 W.2d 39, 46-47, 940 P.2d 1362 (1997).

A trial court's distribution of property following a finding of a meretricious relationship is reviewed for abuse of discretion. Soltero v. Wimer, 128 Wn. App. 364, 371, 115 P.3d 393 (2005). The trial court's ruling on a motion for reconsideration under CR 60 is also reviewed for abuse of discretion. Barr v. MacGugan, 119 Wn. App. 43, 46, 78 P.3d 660 (2003).

## V. SUMMARY OF ARGUMENT

This Court should reverse and remand for multiple independent reasons. First, the trial court erred as a matter of law in the division of the Spanaway Rental. Instead of recognizing the community nature of this asset, the trial court crediting Ms. Van Allen with a substantial separate property interest in the Spanaway Rental. The court did so based on an admittedly unsupported theory of "implied donative intent". This legal

theory flies in the face of the law, and the undisputed evidence and argument that both parties acquired the Spanaway Rental collectively, during their relationship. There was no testimony from the grantee, and none of the formal documentation necessary to justify recharacterization of property as separate. Ms. Van Allen's theory of "implied donative" intent was contrary to Washington law, and represents reversible error warranting a remand for a just and equitable recognition of Dr. Weber's interest in the property.

Second, the trial court misapplied the doctrine of judicial estoppel. Unlike other estoppel doctrines, the courts have ruled that judicial estoppel should not be denied based on a lack of prejudice to the opponent, as the doctrine serves to protect the integrity of the judicial system. This case should be remanded for a proper application of judicial estoppel. Ms. Van Allen's deceptive manipulation of judicial procedure satisfies all three core factors for judicial estoppel, including the third and alternative factor of unfair benefit or unfair harm.

Finally, the trial court abused its discretion when it refused to grant reconsideration, which was necessary to correct a major mutual mistake in the actual assessed value of the parties' jointly owned Chiropractic Office. The parties and court agreed to rely on County assessed values instead of costly appraisers at trial. Shortly after the trial, the County issued a

correction notice, demonstrating without dispute that the Chiropractic Office had been mistakenly overvalued by more than 100% at time of trial. In light of these facts, it was an abuse of discretion not to grant the simple correction in value necessary to avoid the severe inequity resulting to Dr. Weber by the County's mistaken assessment.

## VI. ARGUMENT

### A. The Trial Court Erred By Awarding Ms. Van Allen A Separate Property Interest In The Spanaway Rental Based On An Unsupported Theory Of "Implied Donative Intent".

The trial court erred when it granted Ms. Van Allen a separate property interest of more than $100,000 from a jointly acquired asset based on a theory of "implied donative intent". There was no dispute that both Dr. Weber and Ms. Van Allen acquired the Spanaway Rental during their committed intimate relationship (CIR). See VRP I, p. 8. Yet, the court disregarded the property's presumptively community nature, and accepted Ms. Van Allen's theory of implied donative intent. Ms. Van Allen's own attorney admitted that this theory was unsupported by law, created from thin air. See VRP I, p. 37 ("There is no case law that I can cite that says to the court you have to make this analysis ..."). The theory was contrary to law, and a remand is necessary so that Dr. Weber's quasi-community interest in the Spanaway Rental can be equitably considered under the proper legal standard.

The rules for characterizing property acquired during a CIR are relatively straightforward; these rules essentially track the principles applied to properties acquired during a marriage. Upon determining the existence of a CIR, the trial court is obligated to evaluate each party's interest in the property acquired during the relationship, and make a just and equitable distribution of the property. Soltero, 128 Wn. App. at 371 (citing Connell, 127 Wn.2d at 347-48.). The critical focus is on property that would have been characterized as community property had the parties been married. Income and property acquired during a meretricious relationship is presumed to be owned by both parties for distribution, to avoid unjust enrichment. Soltero, at 371.

In Estate of Borghi v. Gilroy, the Washington State Supreme Court clarified several important concepts for characterizing separate and community property. Estate of Borghi v. Gilroy, 167 Wash.2d 480, 219 P.3d 932 (2010). First, the court reaffirmed the well-established rule that the character of property as community or separate is established at acquisition. Id. at 484. If the property is acquired during the marriage (or CIR), it is presumed to be community property; conversely, property acquired before the marriage is presumed separate.

Second, the Borschi court determined that no presumption as to the character of property owned by couple arises from the names on the title.

Id. at 490. Third and finally, the court held that clear and convincing evidence is required to overcome the presumed character of the property created at acquisition. Id. at 491. "[C]lear and convincing evidence that the property is separate is required to overcome the presumption that it is community in character." In re Marriage of Martin, 32 Wn. App. 92, 96 (Wash. Ct. App. 1982); see Beam v. Beam, 18 Wn. App. 444, 452, 569 P.2d 719 (1977).

These same principles apply generally to properties acquired during a CIR. Connell v. Francisco, 127 Wn.2d 339, 349-50, 898 P.2d 831 (1995). Property acquired during the CIR is presumptively community property, and property acquired before is separate. See In re Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002); see RCW 26.16.030.

**1. The trial court failed to properly characterize the Spanaway Rental as community property.**

The trial court properly applied the time of acquisition rule to all but one property. With the Spanaway Rental, the trial court took a wrong turn and granted Ms. Van Allen a separate property interest, even though there was no dispute that Dr. Weber and Ms. Van Allen acquired the Spanaway Rental from Mr. Phipps during their CIR. See, e.g., VRP I, p.

25 (Ms. Van Allen's own attorney repeatedly noted that Mr. Phipps had gifted the property "to the couple").

Mr. Phipps transferred the property through quit claim to Earth Home Ministries, one of the many entities the parties created during their CIR. This initial quit claim of the Spanaway Rental did not change the rules. A third party's gift of property during a CIR is still presumed to be a gift to the community, absent clear and convincing evidence of a contrary intent by the donor.[3] Hurd v. Hurd, 69 Wn. App. 38, 848 P.2d 185 (1993), overruled in part on other grounds by In re Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009); In re Marriage of Martin, 32 Wn. App. 92, 96, 645 P.2d 1148 (1982). The donor in this case, Mr. Phipps, offered no evidence of a contrary intent to undermine the presumptive community nature of this property. Mr. Phipps did not testify at all, and it

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[3] Assuming the property was a gift, community property law requires evidence of a clear intent by the donor to make the gift to the married donee as separate property. United States v. Moberg, 227 F. Supp. 2d 1136, 1142 (E.D. Wash. 2002), citing In re Marriage of Olivares, 69 Wn. App. 324, 331, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009, 863 P.2d 72 (1993). In Martin, the court held it was necessary to demonstrate a contemporaneous clearly stated intent to make the gift one of separate property. Olivares, 69 Wn. App. at 334.

was error for the court to disregard the presumptive community nature of the property.

The community nature of the Spanaway Rental was further corroborated when Dr. Weber paid $61,000 to Mr. Phipps, for the same property that was purportedly quit claimed to the sham corporation. This payment and related real estate documentation further established the character of the Spanaway Rental as a community asset which was actually "sold" to the parties by Mr. Phipps using Dr. Weber's line of credit. At trial, Ms. Van Allen's attorney acknowledged that this transaction was to the couple, collectively, and that any donative value was received by "both Dr. Weber and Ms. Van Allen". VRP I, p. 25. Whether the property was given to the CIR by gift, by sale or by both, there was no basis for awarding Ms. Van Allen a separate property interest of more than $100,000 in the Spanaway Property.

**2. Ms. Van Allen failed to produce the acknowledged writing necessary to convert real estate acquired during a CIR into a separate asset.**

The trial court decision should also be reversed because there was no acknowledged writing to support the existence of a separate property interest. In Borghi,, the Supreme Court also reaffirmed the rule that, where real property is at issue, an acknowledged writing is generally required to change its character. See Borghi, 167 Wn.2d at 483-85

(citations omitted); see also Volz v. Zang, 113 Wash. 378, 383, 194 P. 409 (1920). While a change into separate property can be accomplished through a quitclaim deed or other real property transfer, a properly executed separate property or community property agreement may also effectuate a transfer of real property. See In re Estate of Verbeek, 2 Wn. App. 144, 467 P.2d 178 (1970). In Borghi, the Supreme Court found it determinative that no acknowledged writing existed to overcome the character of the property created at time of acquisition. In the absence of formal written proof of a different character, the presumption was not overcome, and the real property retained its original character under the acquisition rule. Borghi, 167 Wn.2d at 483-485.

Based on the foregoing, the Spanaway Rental was a community asset, and would retain that character in the absence of a clear written acknowledgement establishing the real property as separate. No such writing was in evidence. There is no formal or acknowledged writing purporting to gift a specified percentage of the real property to Ms. Van Allen, as her separate property. The court created this separate property interest despite repeated acknowledgements by Ms. Van Allen's attorney that the property was transferred to the couple, collectively. The court's partial recharacterization of the Spanaway Rental as Ms. Van Allen's separate property violated well-established Washington law, and must be

corrected to achieve a just and equitable result. Borghi, 167 Wn.2d at 483-485.

**B. The Trial Court Abused Its Discretion By Failing To Apply Judicial Estoppel Based On An Argument That Dr. Weber Was Not Prejudiced.**

The judicial estoppel doctrine precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007); Skinner v. Holgate, 141 Wn. App. 840, 847, 173 P.3d 300 (2007); Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006); McFarling v. Evaneski, 141 Wn. App. 400, 403, 171 P.3d 497 (2007). In this case, Ms. Van Allen asserted a clearly inconsistent position when she claimed interests in the same real estate that she knowingly concealed from the bankruptcy court. The bankruptcy court's acceptance of Ms. Van Allen's sham is confirmed by the fact that Ms. Van Allen was granted a discharge; and by the Trustee's later seizure of the only asset Ms. Van Allen disclosed -- the Spanaway Home she shared with Dr. Weber. See Exhibit 201, Discharge of Debtor, and Trustee's Final Report. Shortly thereafter, Ms. Van Allen moved out of the Spanaway Home and sued Dr. Weber, claiming interests in the very same properties she had disavowed to the bankruptcy court. CP 1-6.

At trial the court agreed that "some elements" of judicial estoppel had been met. VRP I, p. 68; CP 175, par. 39. The court was tempted to apply estoppel, concluding that Ms. Van Allen's refusal to list the properties was "part of a scam to try to avoid IRS debt she owed and probably to defraud some creditors that she bought a lot of things from." VRP I, p. 69.

However, the trial court refused to apply judicial estoppel based on Ms. Van Allen's argument that Dr. Weber was not prejudiced by her duplicity with the courts: "Dr. Weber, I don't think, was particulary injured by her statements in the bankruptcy." VRP I, p. 69. This was an untenable basis for the decision. Lack of prejudice to another litigant is not a relevant consideration for denying judicial estoppel in cases like this, where Ms. Van Allen misled the bankruptcy court. Because the court's ruling is based on an untenable reason, a remand is necessary so that the doctrine of judicial estoppel can be applied under proper legal standards.

**1. Judicial estoppel is especially important when a litigant conceals valuable assets from the bankruptcy court.**

The judicial estoppel doctrine is especially important in cases like this, where a litigant knowingly fails to disclose assets to a bankruptcy court, and then seeks to pursue those same assets in a later proceeding. Debtors who fail to disclose a claim in a bankruptcy proceeding are

generally foreclosed from pursuing those claims in a different court. Arkison, 160 Wn. 2d at 539 ; McFarling, 141 Wn. App. at 400 ("a debtor who fails to disclose a claim for personal injuries in a bankruptcy proceeding cannot later assert that claim in a different court"); Skinner v. Holgate, 141 Wn. App. 840, 847-48, 173 P.3d 300 (2007) ("Courts will generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets ..."); Bartley-Williams, 134 Wn. App. at 98 (the doctrine "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position"), citing Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 225, 108 P.3d 147 (2005); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001) (essence of judicial estoppel in bankruptcy context is to prevent debtor from pursuing claims not disclosed on bankruptcy schedule).

Both the bankruptcy code and court rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets. Skinner, 141 Wn. App. at 848; Cunningham, 126 Wn. App. at 229-30, quoting In re Coastal Plains, Inc., 179 F.3d 297, 207-08 (5th Cir. 1999); accord 11 USC §521(a)(1). The integrity of the bankruptcy process depends upon full and honest disclosure by debtors of all their assets. McFarling, 141 Wn. App. at 403-04, citing Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778,

785 (9th Cir. 2001) and Coastal Plains, 179 F.3d at 208. State and federal courts agree that the importance of full and honest disclosure in bankruptcy proceedings cannot be overemphasized. Cunningham, 126 Wn. App. at 227 note 10, citing Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. Ala. 2002); Coastal Plains, 179 F.3d at 208 (citations omitted). Accordingly, courts preserve the integrity of the bankruptcy process by not allowing debtors to take a duplicitous position on assets in later proceedings. See, e.g.,McFarling, 141 Wn. App. at 400; Cunningham, 126 Wn. App. 222 (debtor's failure to list workplace injury action in his bankruptcy schedules meets the judicial estoppel criteria); Hamilton, 270 F.3d at 785 (plaintiff was judicially estopped from pursuing claim not disclosed on bankruptcy schedule, even where he mailed notice of the pending claim to bankruptcy trustee); Burnes, 291 F.3d at 1286 (the importance of the disclosure duty cannot be overstated); Coastal Plains, Inc., 179 F.3d at 208 (debtor barred from bringing claims not disclosed in its bankruptcy schedules).

**2. The primary purpose of judicial estoppel is to preserve respect for judicial proceedings, not prejudice to an individual litigant.**

The central purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Skinner, 141 Wn.

App. at 849, citing New Hampshire v. Maine, 532 U.S. 742, 749-750, 121 S. Ct. 1808 (2001). The doctrine serves to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and waste of time. Cunningham, 126 Wn. App. at 225; Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 906, 28 P.3d 832 (2001); Arkison, 160 Wn.2d at 538.

The doctrine of judicial estoppel is applied to further the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts. Hamilton, 270 F.3d at 782; Coastal Plains, 179 F.3d at 205. The important emphasis of judicial estoppel in protecting the integrity of the judicial process was eloquently described in a 1997 law review, on which the Court of Appeals has relied:

> Almost all courts recognize the crucial role the judicial estoppel doctrine has had in advancing public policy objectives that relate to the essential integrity of the judicial process. By binding litigants to their judicial representations, the judicial estoppel doctrine combats intentional self-contradiction, inconsistent judicial results and the perception that the judiciary is controlled by powerful and frequent users of the judicial system. It prevents unnecessary litigation and the ensuing inefficiency of the judicial system. It promotes the orderly

> administration of justice and fosters credibility and certainty within the judicial system. Courts invoke the judicial estoppel doctrine in order to uphold the integrity of the judiciary when litigants, through litigation of inconsistent positions based on shifting interests, would countenance the devolution of the judicial system into a forum of "mere gamesmanship".

Eugene R. Anderson and Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 Conn. Ins. L.J. 589, 622 (1997-1998) (hereafter cited as *Preventing Inconsistencies*), cited in Johnson, 107 Wn. App. at 907-08.

**3. The trial court misapplied judicial estoppel by allowing Ms. Van Allen to maintain inconsistent positions based on the conclusion that her opposing litigant was not prejudiced.**

Although not an exhaustive formula, the trial court generally considers three factors when deciding to apply judicial estoppel: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party successfully persuaded a court to accept the party's earlier position, but then creates the perception that the court was misled when the party adopts a later inconsistent position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair

advantage or impose an unfair detriment to the opposing party if not estopped. Skinner, 141 Wn. App. at 848, citing New Hampshire, 532 U.S. at 750-51; see also McFarling, 141 Wn. App. at 404; Cunningham, 126 Wn. App. at 230-231.

Importantly, while the third factor of detriment to an opposing party supports application of judicial estoppel, numerous courts recognize that judicial estoppel should not be denied based on an argument that another litigant was not harmed. See, e.g., Johnson, 107 Wn. App. at 907-909, citing *Preventing Inconsistencies in Litigation,* 4 Conn. Ins. L.J. 589, 632-633 (citations omitted); Coastal Plains, 179 F.3d at 210 (trial court erred by not applying judicial estoppel because lack of harm to debtor's opponent was "irrelevant").

The policy objective of equitable estoppel is "to ensure fairness in the relationship between the parties." Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U.L. Rev. at 1248 (citations omitted). By contrast, judicial estoppel focuses on "the relationship between the litigant and the judicial system," and is designed "to protect the integrity of the judicial process." Id. at 1248-49, quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982). This fundamental distinction explains why courts "should not impose elements of related doctrines like equitable and collateral estoppel, which

are intended primarily to protect litigants."[4] Johnson, 107 Wn. App. at 907-08.

Numerous cases recognize that lack of harm is not a proper basis for denying judicial estoppel. The underlying basis for this rule was carefully examined in Johnson v. Si-Cor, Inc., where the Court of Appeals reviewed and rejected the analysis of older cases which failed to recognize that the judicial estoppel doctrine is designed to protect the court, and not litigants. Johnson, 107 Wn. App. at 907. The Court noted that these older cases "inappropriately interjected ordinary estoppel principles into the doctrine of judicial estoppel." Id. (citations omitted). Instead, the Court followed the majority rule, which holds that prejudice to a litigant is an improper factor for judicial estoppel:

> The majority of courts that have considered the matter have concluded that privity of the parties, reliance, and prejudice

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[4] This distinction also explains why the third factor of unfair benefit or detriment need not be satisfied where the second factor of judicial acceptance is present. See Cunningham, 126 Wn. App. at 231 ("Both are not require[d]"); accord, Johnson, 107 Wn. App. at 909 (describing the second and third factors in the alternative); Coastal Plains, 179 F.3d at 206 (discussing the first and second factors for the doctrine).

> -- generally recognized elements of estoppel -- **are inapplicable to the doctrine of judicial estoppel.**

Johnson, 107 Wn. App. at 907-08 (emphasis supplied), citing *Preventing Inconsistencies in Litigation,* 4 Conn. Ins. L.J. at 622-36 (other citations omitted). Based on this analysis and authority, the Court concluded that the judicial estoppel doctrine may be applied even if the two actions involve different parties, and even if there is "no resultant damage" from the inconsistency. Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-908 (2001); accord McFarling, 141 Wn. App. at 404, 500-01 (rejecting a rule of "no harm, no foul", because harmless error is not a proper step in the analysis).

Washington courts have relied on two leading federal cases which also follow the majority rule, and hold that harm or prejudice to the opponent is not the relevant consideration. See In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999) (relied on in McFarling and Cunningham); and Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1281 (11th Cir. 2002) (relied on in in Skinner, McFarling, and Cunningham). In Coastal Plains, the debtor, Coastal Plains, sought to pursue claims against Browning Manufacturing, its largest creditor. at Browning invoked judicial estoppel, pointing out that Coastal Plains failed to disclose the claims in its bankruptcy proceedings. The trial court refused to apply judicial estoppel

on several grounds, including Coastal's argument that the claims were later addressed in an adversary proceeding, and Browning was not prejudiced by the nondisclosure because it was aware of the claims. Coastal Plains, 179 F.3d at 208-09. Browning appealed, and the Court of Appeals reversed, concluding that the trial court abused its discretion in refusing to apply judicial estoppel based on a lack of prejudice:

> Browning's knowledge of the claims, or its non-reliance on the nondisclosure, even if supported by the record, are irrelevant. As discussed supra, unlike the well-known reliance element for other forms of estoppel, such as equitable estoppel, detrimental reliance by the party seeking judicial estoppel is not required. Again, the purpose of judicial estoppel is not to protect the litigants; it is to protect the integrity of the judicial system.

Coastal Plains, 179 F.3d at 210. Because prejudice to the litigant was irrelevant, the court of appeals ruled that the trial court had abused its discretion.

Coastal Plains also tried to argue that judicial estoppel be denied because Browning was itself a wrongdoer, who also took inconsistent positions related to a defense. This too, was not relevant. "Again, the purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or to protect litigants." Coastal Plains, 179 F.3d at 213. The trial court's decision denying judicial estoppel was reversed, and judgment was rendered in Browning's favor.

In another leading federal case, Burnes, the plaintiff argued that Pemco could not rely on judicial estoppel "because Pemco was not prejudiced by the omission of the claim from the bankruptcy proceeding." Burnes, 291 F.3d at 1286. The Eleventh Circuit disagreed, and followed "numerous courts" holding that detriment is not required for judicial estoppel, which protects the integrity of the judicial system:

> courts have concluded that since the doctrine is intended to protect the judicial system, those asserting judicial estoppel need not demonstrate individual prejudice. . . .

Burnes, 291 F.3d at 1286, citing Coastal Plains, 179 F.3d at 205. Following this analysis, the court affirmed a summary judgment dismissal of the plaintiff's claims under judicial estoppel.

Here, the trial court abused its discretion when it refused to apply judicial estoppel based on the erroneous ground of an alleged lack of prejudice to Dr. Weber:

> Dr. Weber, I don't think, was particularly injured by her statements in the bankruptcy. He did, of course, have to apply some money to the line of credit or expand it, but we can address that here, so there's no ultimate injury to him. So between the two of them, whatever their intent was with the outside world, I don't think estoppel applies here, so I'm not going to apply it.

VRP I, p. 69. This analysis is based on untenable reasoning because the courts have repeatedly held that proof of prejudice is neither required nor

relevant to the judicial estoppel analysis, which remains focused on protecting the integrity of the judicial process. See, e.g., Johnson, 107 Wn. App. at 907-908. Ms. Van Allen's chicanery in the bankruptcy proceeding was an insult to the integrity of the court system, without regard to the alleged lack of harm to Dr. Weber, who ultimately footed the bill for her scam. As in Coastal Plains, this was an erroneous basis for refusing to apply judicial estoppel, and should be reversed.

**4. Even if lack of harm were a proper factor, the third factor of an unfair advantage or unfair harm is also present, as a matter of law.**

As discussed above, the third factor is an alternative to the second factor, and the absence of prejudice to the deceiver's opponent was not a proper basis for denying judicial estoppel. However, even if the majority rule did not apply in Washington, the trial court would still need to be reversed because the undisputed facts show that the third optional factor for judicial estoppel was satisfied.

The third factor is whether the party seeking to assert an inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. Cal. 2001), quoting New Hampshire v. Maine, 532 U.S. 742, 131 S. Ct. 1808, 1815 (2001) (internal citations omitted).

In Skinner, a plaintiff who failed to disclose certain assets in his bankruptcy schedule argued that his opponent, Holgate, did not derive an unfair advantage. Holgate had participated in the bankruptcy proceeding, was aware of Skinner's undisclosed claim, and even attempted to negotiate for a settlement of Skinner's claim with the bankruptcy trustee after his case was reopened. Skinner, 141 Wn. App. at 850-51. The Court of Appeals rejected Skinner's argument, noting that retention of the claim against Holgate was a benefit that, by itself, permitted application of judicial estoppel. Id. at 853. As in Skinner, Ms. Van Allen had a duty to carefully schedule her assets. By failing to do so, she successfully deceived the bankruptcy court and retained the benefit of undisclosed property interests, free from the bankruptcy's power to seize those assets to pay off her credit card debts. That benefit alone justified application of judicial estoppel. Skinner, 141 Wn. App. at 853.

In addition, the trial court's statement that Dr. Weber was not harmed is refuted by undisputed facts in the record. Before leaving Dr. Weber, Ms. Van Allen pursued a disingenuous plan to discharge debts she had recently run up on her credit cards through a bankruptcy proceeding where she failed to disclose jointly held assets. The bankruptcy Trustee seized the only asset she did disclose – the unprotected residence. This scheme ultimately forced Dr. Weber to borrow an additional $87,477

against his line of credit under crisis circumstances, to pay off the liabilities in Van Allen's bankruptcy in order to save his home. CP 27-28; Exhibit 58; Exhibit 201. When Ms. Van Allen filed the present suit, she turned around and claimed interests in all of the previously undisclosed properties, using them as a reservoir of value from which Dr. Weber ultimately paid more than half of her credit card and tax liabilities. After Ms. Van Allen left him, Dr. Weber continued to pay thousands of dollars in interest on the line of credit used to bail Ms. Van Allen out of her fraudulent bankruptcy. See VRP II, p. 26-27; Exhibit 58; CP 96-96. Weber requested an equitable credit for this interest, but no consideration of this substantial financial prejudice is apparent in the court's decision.

### C. The Trial Court Abused Its Discretion When It Refused To Grant Relief Necessary To Remedy The Extraordinary Mistake In Value For The Chiropractic Office.

The trial court should have granted relief under CR 60(b), and revised its judgment and order to reflect the County's extraordinary and retroactive change in the assessed value for the Chiropractic Office. Under CR 60(b) a party may move under such terms as are just for relief from a final judgment or order, based on the following grounds:

> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> . . . .

> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> . . . .
> (11) Any other reason justifying relief from the operation of the judgment."

CR 60(b). Dr. Weber's motion for relief from the judgment and order was justified by the extraordinary correction to the assessed value for the Chiropractic Office, issued less than two months after the court's ruling. CP 214-218. This change notice, which was based on the County's own mistakes in appraisal, revised the assessed value to $79,800 – a drop of more than $100,000. CP 214-218. At trial, the parties and the court equally viewed the County-assessed value as the most reasonable and accurate evidentiary benchmark for valuing the properties. See, e.g., VRP I, pp. 6, 11, 34, 39-40, 63, 76. The reliance on County assessments was a procedure agreed to by all parties and the court, and connotes no fault or lack of diligence by any party – the procedure equally benefited both parties, including Ms. Van Allen who was as familiar with the Chiropractic Office as Dr. Weber.

To deny reconsideration under these circumstances would defeat the central purpose of CR 60(b) without any tenable reason. It was manifestly unjust to penalize Dr. Weber merely because the County appraisal process relied on a flawed analysis that grossly overstated the

actual value of a property that was ultimately transferred to Dr. Weber at the end of the proceedings. Relief is necessary to further the interests of justice, and to prevent a division of assets based on erroneous and unfair calculations that substantially prejudiced Mr. Weber's rights. There were multiple independent bases in CR 60(b) which supported relief in this situation.

**1. Relief was warranted under CR 60(b)(1) for "mistake", "inadvertence" and "surprise", where the County's Value Change Notice reveals that Weber's Chiropractic Office was mistakenly overvalued by more than 100%.**

During trial the parties agreed that Pierce County assessed values would be reasonably relied upon for valuing their real estate holdings. See, e.g., VRP I, p. 40 ("[T]he values are the values. There's nothing I can do about it."); VRP I, p. 63-64 (counsel for Ms. Van Allen agreed that updated 2011 assessments should be treated as "current value"). Neither party objected to this approach, which allowed the parties and court to proceed with trial in an expeditious and cost-effective manner, without the time and expense of competing expert appraisers.

On or about February 15, 2011, as trial approached, the County revised the assessed property values, with the chiropractic office valued at $182,200.00. Based on these revisions, the parties and court replaced the outdated valuations with these corrected County assessments.

Declaration of Weber. These updated County assessments were ultimately relied upon in the court's formula for a just and equitable distribution. In its May 5, 2011 judgment and order, the trial court awarded $61,000 as Ms. Van Allen's share of Dr. Weber's chiropractic office. As with other properties, the trial court's award was based on the County assessed value, which was the evidence both parties submitted at trial:

> The court adopts the current value, as established by the 2011 Pierce County Assessor, of the South Tacoma Way real property, which is $182,000. After allotting one-third of the value to Weber to account for his down payment, the parties only have a two-thirds interest in the South Tacoma Way property. Van Allen is entitled to approximately one-third of the current value, which is $61,000.

CP 172, Finding No. 17 (May 5, 2011). Less than two months after this finding, the Pierce County Assessor Treasurer issued a Real Property Value Change Notice for the chiropractic office. CP 214-18.

The County's Notice revealed, for the first time, that the chiropractic office was mistakenly over-valued **by more than 100%.** See Declaration of Vernon Weber, and attached Notices. While other properties also showed significant downward adjustments, the County's correction notice for the Chiropractic Office showed a drop of more than 50%, from the $182,200 utilized by the court in its formula to

$79,800. This value change far exceeded any expected range of commercial real estate depreciation that either party could have anticipated. More importantly, this value represented the true and accurate value of the property at the time of trial. By its terms, the County's valuation was deemed to be effective as of January 1, 2011 – shortly before the trial where the issue of value was to be decided. CP 214-18. Thus, the agreed basis for valuing properties at trial was in error. Neither the parties nor the court could have anticipated this shocking drop in value.

For purposes of CR 60(b)(1), the parties' mutual mistake as to valuation was excusable, and came as a complete surprise. To blame Dr. Weber because he "could and should have known of a potential re-valuation based on his twenty year ownership" is untenable. See CP 268. There is no fault or prejudice to assign to Dr. Weber. Ms. Van Allen's years of ownership made her just as knowledgeable about the risk of re-evaluation, and her full cooperation in an efficient procedure for valuing their joint assets gives her no basis to penalize Dr. Weber.

It was an unjust and inequitable abuse of discretion for the trial court not to grant relief, and correct the erroneous value for the Chiropractic Office. Dr. Weber respectfully asks that this court reverse

the trial court and remand so that the court's calculations reflect the actual value of the Chiropractic Office.

**2. The trial court should have granted relief under CR 60(b)(3), as the Value Change Notice represents "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial".**

Dr. Van Allen was also entitled to relief under CR 60(b)(3), as the County's Value Change Notice represents newly discovered evidence which by due diligence could not have been discovered at the time of trial. As discussed, the parties agreed to an equally beneficial arrangement under which County assessed values were directly admissible as evidence, without objection. Both parties took advantage of this mutually advantageous evidentiary foundation for determining value on jointly owned properties, and even replaced outdated assessments as they were updated by the County in February of 2011. The assessments represented the agreed evidentiary basis, and there was no good reason to refuse to correct the court's ruling when the flaws in the underlying evidence were revealed so shortly after the decision.

### 3. Dr. Weber was also entitled to relief under under CR 60(b)(11), to the extent the Value Change Notice was an extraordinary circumstance not covered by other sections.

A motion for relief under CR 60(b)(11) is also justified in situations involving "extraordinary circumstances not covered by any other section of the rule." Summers v. The Dept. of Revenue, 104 Wn. App. 87, 14 P.3d 902 (2001); In Re: Marriage of Tang, 57 Wn. App. 648, 789 P.2d 118 (1990). The catch all provision permits the court to relieve a party from final judgment for any other reason justifying relief from operation of judgment, and supports vacation of a default order and judgment based upon incomplete, incorrect, or conclusory factual information. Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993). Under the rule, the court may exercise its inherent equitable power to supervise execution of judgment to prevent an inequitable result when there has been a change in circumstances. Pacific Security Companies v. Tanglewood, Inc., 57 Wn. App. 817, 790 P.2d 643 (1990) (creditor obtained vendor's interest, by purchase, during pendency of mortgage foreclosure).

The County's announcement that the assessed value was flawed and needed correction, presented an extraordinary and unexpected change in the agreed basis for valuing properties to be distributed. The trial court was legally bound to achieve a just and equitable distribution

of property, consistent with the parties' reasonable evidentiary foundations. The trial court abused this discretion when it refused to correct a patently unjust decision based on the untenable reason that Dr. Weber is somehow more at fault for the County's mistakes then Ms. Van Allen. See CP 268, par. 3. The trial court's ruling should be reversed, and the case remanded to allow reconsideration of the calculations based on the corrected assessment.

## VII. CONCLUSION

The appellant, Vernon Weber, respectfully asks that this court reverse the trial court and remand this matter for a decision that correctly recognizes his community interest in the Spanaway Rental; that applies the doctrine of judicial estoppel based on the proper legal standards; and which reconsiders the assessed value of the Chiropractic Office in light of the extraordinary correction notice issued by the County Assessor shortly after trial.

**RESPECTFULLY SUBMITTED** this 17th day of January, 2012.

Talis M. Abolins, WSBA #21222 of
Campbell, Dille, Barnett, & Smith, PLLC
Attorneys for Appellant, Vernon Weber

**COURT OF APPEALS, DIVISION II**

**OF THE STATE OF WASHINGTON**

| | |
|---|---|
| JANE VAN ALLEN,<br><br>Plaintiff,<br>and<br><br>VERNON WEBER, EARTH HOME MINISTRIES, INC.; REAL SYSTEMS, INC; OPERATING SYSTEMS, INC.; APPOINTED MANAGEMENT, INC.; OPEN OPTIONS, INC.; SMART HOLDINGS (a trust); SERENITY HOLDINGS (a trust); BEGINNINGS (a trust); and POWER PLAY (a trust);<br>Defendants. | No. 42169-1<br><br>**DECLARATION OF SERVICE** |

**THE UNDERSIGNED**, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 17th day of January, 2012, she caused a copy of the following documents:

(1) Brief of Appellant

to be served on the parties listed below by the method(s) indicated:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 17th day of January, 2012.

Michelle A. Lea